SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA DIVISION

TENTATIVE RULINGS

EVENT DATE: 12/21/2015 EVENT TIME: 08:20:00 AM DEPT.: 43
JUDICIAL OFFICER: Kevin DeNoce

CASE NUM: 56-2014-00458073-CU-AS-VTA
CASE TITLE: ROBERT DENYER VS AB ELECTROLUX

CASE CATEGORY: Civil - Unlimited CASE TYPE: Asbestos

EVENT TYPE: Motion for Summary Judgment - or, in the alternative, for summary adjudication of issues
CAUSAL DOCUMENT/DATE FILED: Motion for Summary Judgment, 10/22/2015

With respect to the below scheduled tentative ruling, no notice of intent to appear is required. If you wish to submit on the tentative decision, you may submit a telefax to Judge DeNoce's secretary, Hellmi McIntyre at 805-662-6712, stating that you submit on the tentative. Do not call in lieu of sending a telefax, nor should you call to see if your telefax has been received. If you submit on the tentative without appearing and the opposing party appears, the hearing will be conducted in your absence. This case has been assigned to Judge DeNoce for all purposes.

Absent waiver of notice and in the event an order is not signed at the hearing, the prevailing party shall prepare a proposed order and comply with CRC 3.1312 subdivisions (a), (b), (d) and (e). The signed order shall be served on all parties and a proof of service filed with the court. A "notice of ruling" in lieu of this procedure is not authorized.

The court's tentative ruling is as follows:

Grant Plaintiffs Gertrude Denyer's, Edward Lawrence Denyer's and Elizabeth Denyer Hoggan's request for judicial notice.

Sustain Plaintiffs' evidentiary objections to the declaration of Defendant Bell Industries, Inc.'s ("Bell") counsel Ann Park's original declaration as to Objections Nos. 3, 10-16, 18, and 20.

Overrule Plaintiffs' remaining Objections to Park's original declaration.

Overrule Plaintiffs' evidentiary objections to the declaration of Defendant Bell's expert Dr. Gail Stockman.

Overrule Plaintiffs' evidentiary objections to the declaration of Defendant Bell's expert Kathy Jones.

Sustain Bell's evidentiary objections as to Objection No. 7. Overrule Bell's remaining evidentiary objections.

Find, for the purposes of the present motion only, that: (i) Bell's Material Facts Nos. 1-9, 65, 66, 69, 70, 75, 84, 85, and 103 are undisputed and established; (ii) Bell's Material Facts Nos. 10, 13, 15-27, 29, 31-35, 42, 45, 47-56, 60, 61, 62, 86, 87, 89-91, 104, and 108 are disputed and established; (iii) Bell's Material Facts Nos. 11, 12, 14, 30, 36-41, 43, 44, 46, 57-59, 63, 64, and 92 are disputed and not established; (iv) Bell's Material Fact No. 28 is disputed and not established as to the questioning being leading, but otherwise established; (v) Bell's remaining Material Facts are repetitions of the Material Facts addressed above; (vi) Plaintiffs' Additional Material Facts Nos. 1, 2, 5, and 8-10 are supported by the cited-to evidence and established; and (vii) Plaintiffs' Additional Material Facts Nos. 3, 4, 6, 7, 11, and 12 are not supported by the cited-to evidence and not established, primarily because they consist of legal argument.

Plaintiffs Allegations:

Plaintiffs' 1st Amended Complaint asserts causes of action for (1) negligence; (2) strict liability; (3) false representation under Restatement of Torts §402-B; (4) intentional tort; (5) premises owner/contractor liability; (6) survival action; and (7) loss of consortium. Plaintiffs Gertrude Denyer's, Edward Denyer's, and Elisabeth Hoggan's 1st Amended Complaint alleges, generally, as follows:

Each of the approximately 30 named Defendants was the successor/assign/ predecessor/parent/subsidiary/owner/member in an entity researching/studying/ manufacturing/fabricating/designing/modifying/labeling/assembling/distributing/leasing/buying/offering for sale/supplying/selling/inspecting/servicing/ installing/repairing/ marketing/warranting/packaging/advertising asbestos and products containing asbestos. Defendants are also liable for the acts of their "alternate entities" in that there has been a virtual destruction of Plaintiffs' remedies against such "alternate entities," and because Defendants have acquired the assets or product lines (or a portion thereof) of the alternative entities, have the ability to assume the risk-spreading role of those "alternative entities," and enjoy the goodwill originally attached to those "alternate entities."

Defendants negligently researched/manufactured/fabricated/designed/modified/tested (or failed to test)/abated (or failed to abate)/warned (or failed to warn)/labeled/assembled/ distributed/ leased/bought/offered for sale/supplied/sold/inspected/serviced/ installed/contracted for installation/repaired/marketed/warranted/rebranded/packaged /advertised asbestos and products containing asbestos, and said products caused personal injuries to user/consumers/workers/bystanders/others, including Plaintiffs, while being used in a manner that was reasonable foreseeable, thereby rendering said products unfit for use.

Defendants knew or should have known and intended that the aforementioned asbestos and products containing asbestos would be transported by truck/rail/ship/common carrier, that in the shipping process the products would break/crumble/be damaged, and/or that the products would be used for insulation/construction/plastering/fireproofing/ soundproofing/other applications resulting in the release of airborne asbestos fibers and that through foreseeable use and/or handling exposed persons, including decedent Robert Denyer ("Decedent") would be in proximity to and exposed to asbestos fibers. *Decedent used, handled, or otherwise been exposed to asbestos and asbestos-containing products* at various locations as set forth in Exhibit A to the Complaint.

Defendants and their "alternate entities" breached their duties by, inter alia, (a) failing to warn Plaintiff Robert of the dangers/characteristics/potentialities of their asbestos-containing products when Defendants knew or should have known that exposure to those products would cause disease and injury; (b) failing to warn Plaintiff Robert of the dangers to which he was exposed when Defendants knew or should have known of the dangers; (c) failing to exercise reasonable care to warn Plaintiff Robert of what would constitute safe , sufficient, and proper protective clothing/equipment/appliances when working near or being exposed to Defendants' asbestos or asbestos-containing products; (d) failing to provide safe, sufficient and proper protective clothing/equipment/appliances with their asbestos and asbestos-containing products; (e) failing to test their asbestos or asbestos-containing products in order to ascertain the dangers involved upon exposure to their asbestos and asbestos-containing products; (f) failing to exercise reasonable care in conducting research to ascertain the dangers involved upon exposure to their asbestos and asbestos-containing products; (g) failing to remove the product(s) from the market when Defendants knew or should have known of the hazards of exposure to their asbestos and asbestos-containing products; (h) failing, upon discovery of the dangers/hazards/ potentialities of exposure to asbestos, to adequately warn Plaintiff Robert of said dangers/hazards/ potentialities; (i) failing, upon discovery of the dangers/hazards/ potentialities of exposure to asbestos, to package their asbestos and asbestos-containing products so as to eliminate said dangers/hazards/ potentialities; (j) failing to advise Plaintiff and others that the risks inherent in their asbestos-containing products greatly outweighed any benefits afforded by such products; and (k) generally using unreasonable/careless/negligent conduct in the manufacture/fabrication/supply/ distribution/ sale/installation/use of their asbestos and asbestos-containing products.

As a result of the conduct of Defendants and their "alternate entities," Decedent's exposure to asbestos and asbestos-containing products caused severe and permanent injury to Decedent as set forth in Exhibit A to the Complaint. Decedent suffered and died from a condition related to exposure to asbestos and asbestos-related products: namely, lung cancer and other asbestos pleural disease. Decedent was not aware at the time that of exposure that asbestos or asbestos-containing products presented any risk of injury and/or disease. Plaintiffs did not learn of the causal relationship between Decedent's exposure to asbestos and his death on May 21, 2015, until less than a year

before the filing of the 1st Amended Complaint.
Plaintiffs are the heirs of Decedent: (i) Plaintiff Gertrude is Decedent's spouse and successor-in-interest; (ii) Plaintiff Edward is Decedent's son; and (iii) Plaintiff Elisabeth Hoggan is Decedent's daughter. As a result of Defendants' conduct, Plaintiffs suffered pecuniary loss from the loss of love, comfort, society, attention, services, and support of Decedent.

Summary of Defendant Bell Industries, Inc. motion for judgment judgment/summary adjudication:

Defendant Bell Industries, Inc. ("Bell") moves for summary judgment on Plaintiffs Gertrude Denyer's, Edward Lawrence Denyer's, and Elizabeth Denyer Hoggan's 1st Amended Complaint or, alternatively, summary adjudication of three specified Issues. Bell alleges as follows:

It is indisputable that Decedent's lung cancer was caused by his cigarette smoking. Moreover, Plaintiffs have presented no admissible evidence, and cannot be reasonably expected to present such evidence at trial, supporting their claims that Decedent was substantially exposed to asbestos from any product supplied by Bell or its predecessors, Desert Service Corporation ("Desert") or Reliable Steel Supply Co. ("Reliable"). Decedent's deposition taken in his personal injury action provides deficient identification as to Bell, constitutes speculation, and lacks any foundation to support a claim of substantial exposure. Moreover, Plaintiffs' purported witnesses either do not have information to support the claims against Bell or are deceased. Finally, Plaintiffs' discovery responses do not provide any information supporting their claims. Instead, Plaintiffs make overbroad and conclusory claims regarding Bell's alleged actions/inactions which are not supported by admissible evidence.

Plaintiffs cannot show that Bell was a legal or proximate cause of Decedent's disease. Plaintiffs cannot demonstrate Decedent's actual exposure to asbestos from products supplied by Bell. In order to establish causation, Plaintiffs must establish substantial exposure. Plaintiffs have only speculation that Decedent worked with asbestos-containing products supplied by Bell. While Decedent testified that he obtained and worked with asbestos tape, flexible duct connectors, and joint compound materials from Reliable and Desert, he had no information regarding the brand name and manufacturer of the asbestos tape or joint compound supplied by Reliable and Desert, nor could he quantify the amount of flexible duct connectors, if any, supplied by Reliable or Desert. Because Decedent could not identify the brand name or manufacturer of the asbestos tape or joint compound material, Plaintiffs cannot establish that those products contained asbestos.

Based on Decedent's own admissions, there is no support for a finding of "substantial factor" causation to support Plaintiffs' claims against Bell. Certified Industrial Hygienist Kathy Jones affirms that there is no evidence that Decedent was substantially exposed to asbestos from any products supplied by Bell or its predecessors. Bell has met its burden of production and therefore is entitled to summary judgment.

Bell is also entitled to summary adjudication of Plaintiffs' claims for false representation, intentional tort, and punitive damages because Plaintiffs have no evidence that Bell committed any fraud or acted with malice.

Procedural Issues:

Defendant Bell's Notice of Errata and Supplemental Park Declaration

Defendant Bell filed its moving papers on October 22, 2015, the last day for it to file and personally serve its moving papers under the 60-day notice period stipulated to by the parties. On October 23, one day later, Bell filed a "Notice of Errata Re Exhibits in Support of Declaration of Kathy S. Jones..." which indicates that Exhibits E through H to Jones' declaration had been inadvertently omitted from the Jones declaration filed on October 22, and attaches the "missing" exhibits. Plaintiffs object to Bell's Notice of Errata on the ground that it was filed after the last day for timely personal service, October 22, and therefore is untimely.

The Court overrules Plaintiffs' objection to Bell's Notice of Errata. First, the Court notes that Exhibits E to H ***are*** attached to the copy of Jones' declaration filed with the Court on October 22, and therefore were timely filed. As a result, as to the ***filed*** copy of Jones' declaration – the Notice of Errata was unnecessary and superfluous.
Even assuming that the copy of Jones' declaration served on Plaintiffs' counsel on October 22 was missing Exhibits E through H, and that the Notice of Errata was necessary as to the ***served*** copy of Jones' declaration, that Notice of Errata

was served only one day late, Plaintiffs have filed a substantive opposition to Bell's motion, and Plaintiffs' fail to submit any evidence indicating that they were prejudiced by the late service. Accordingly, the Court any objection to the lateness of the Notice of Errata has been waived. (See *Carlton v. Quint* (2000) 77 Cal. App. 4th 690, 697-698.)

Supplemental Park Declaration

On October 27, 2015, Bell filed a supplemental declaration of its counsel Ann Park and accompanying Exhibit 29 (the declaration of Decedent's coworker Raymond Wileman). The sole purpose of Park's supplemental declaration is to indicate that she did not receive Wileman's declaration until October 23, and to authenticate Wileman's declaration. As with the Exhibits attached to Bell's Notice of Errata, Plaintiffs also object to Park's supplemental declaration on the ground that it was untimely filed and served 5 days after the October 22 deadline for personal service of Bell's moving papers. Since Plaintiffs fail to establish any prejudice the Court overrules Plaintiffs' objection to the supplemental Park declaration. The Court notes that given that Bell's counsel did not receive a copy of Wileman's declaration until after Bell's original moving papers had been filed, there is some justification for Bell's late filing of this document.

Defendant Bell's "Reply" Evidence

For this first time with its reply papers, Bell submits the second supplemental declaration of its counsel Ann Park and Exhibits 30 through 38 thereto. The general rule is that the Court will normally not consider "reply" evidence submitted in support of a motion for summary judgment/adjudication in the absence of exceptional circumstances which might justify consideration of this "reply" evidence. (See *Plenger v. Alza Corp.* (1992) 11 Cal.App.4th 349, 362, fn.8; *San* Diego *Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316; *Nazir v. United Airlines, Inc.*, supra, 178 Cal.App.4th at p. 252.) Here, Bell's counsel Park's second supplemental declaration is largely non-substantive, and was submitted solely to authenticate the additional exhibits and to indicate why they were not submitted with Bell's moving papers.

As to the exhibits themselves, they consist of (i) excerpts from the deposition transcript of Plaintiff's expert Dr. Barry Levy taken on December 3, 2015 (Exh. 30); (ii) excerpts from the transcript of the telephonic deposition of Plaintiffs' expert John Templin taken on December 2, 2015 (Exh. 31); (iii) excerpts from the transcript of the telephonic deposition of Plaintiffs' expert Dr. Robert Fallat, taken on November 25, 2015 (Exh. 32); (iv) a copy of the declaration of defense expert Dr. Gail Stockman filed in support of Familian's motion for summary judgment/adjudication (Exh. 33); (v) Plaintiffs' evidentiary objections to the declaration of Dr. Stockman filed with respect to the Familian motion (Exh. 34); (vi) the Court's tentative ruling on Familian's motion issued on December 14, 2015, which was adopted as the Court's final ruling (Exh. 35); (vii) the October 19, 2015 Certificate of Kristin Vargas, Certified Shorthand Reporter for Plaintiff Elisabeth Hoggan's deposition (Exh. 36); (viii) excerpts from the certified transcript of Plaintiff Edward Denyer's deposition (Exh. 37); (ix) the September 15, 2015 Report of Plaintiff's expert Dr. Fallat (Exh. 38).

The evidence in (vii) and (viii) above is merely curative in nature (i.e., it cures technical defects in evidence already submitted, and Bell's counsel Park states facts indicating that the latter was not available at the time Bell filed its moving papers. Accordingly, the Court will consider "reply" Exhibits 36 and 37. As to the partial deposition transcripts in (i), (ii), and (iii) above, these depositions were all taken after Bell filed its original moving papers on October 22. Moreover, these deposition transcripts do not contain "new matter" so much as attempt to put the declaration statements of Plaintiffs' experts in context, and therefore are merely supplemental in nature. As such, the Court will consider Exhibits 30 through 32 as well.

As to (iv) through (vi) above, these exhibits are being submitted as evidence of the Court's rulings on Plaintiffs' evidentiary objections to Stockman's declaration in the context of Defendant Familian's motion for summary judgment/adjudication. Specifically, the Court overruled Plaintiffs' objections to Dr. Stockman's declaration in the context of the Familian motion, and Bell is apparently suggesting that the Court should make the same ruling her. Although the Court is not necessarily bound by its prior rulings on the admissibility of Dr. Stockman's statements regarding the cause of Decedent's cancer, there is no obvious reason why the Court would reach any different conclusions in the context of the present motion. Moreover, all of the subject Exhibits are court records which would be the proper subject of a request of judicial notice. As such, the Court considers Exhibits 33 through 35 as well.

Finally, Exhibit 38 is a Case Report prepared by Plaintiffs' expert Dr. Fallat on September 15, 2015, plus a cover letter indicating that it was sent to Defendants' counsel on November 19, 2015. Once again, this evidence was not available

to Bell at the time it filed its moving papers on October 22, is supplemental in nature (i.e., it merely attempts to put Fallat's declaration statements in proper context) rather than entirely new, and therefore will be considered.

Based on the above, the Court will consider all of Bell's "reply" evidence, but give Plaintiffs an opportunity to respond to this matter.

Plaintiffs' Late Evidence

On December 9, 2015, the same day Familian filed its reply papers, Plaintiffs filed a supplemental declaration of their counsel Tenny Mirzayan and attached Exhibit A. The sole purpose of Mirzayan's supplemental declaration and Exhibit A is to submit Dr. Fallat's Curriculum Vitae, which document was inadvertently omitted from his declaration filed with Plaintiffs' original opposition papers. Because this evidence is merely curative in nature, the Court will consider it.

Plaintiffs' Responsive Separate Statement

Plaintiffs' Responsive Separate Statement contains no response at all to Bell's Material Facts Nos. 65 through 83 (i.e., the side for Plaintiffs' response is completely blank). These Material Facts all go to the third cause of action for false representation. Plaintiffs' failure to respond appears to be the result of some editing error, as Plaintiffs' Opposition Brief disputes the merits of Bell's motion as to the false representation claim.

As to 14 of the 19 Material Facts to which Plaintiffs failed to respond, the Court views this as a non-issue since these 14 Material Facts are mere repetitions of Material Facts found elsewhere in Plaintiffs' Responsive Separate Statement as to which Plaintiff did respond. As to the remaining 5 Material Facts to which Plaintiffs failed to respond, the Court considers them to be undisputed since Plaintiffs failed to dispute them.

Defendant Bell's Request for Summary Judgment

Defendant Bell contends that it is entitled to summary judgment on the grounds that (a) Plaintiffs lack evidence of Decedent Robert Denyer's substantial exposure to asbestos attributable to Bell; and (b) the evidence establishes that Decedent's lung cancer was caused by his history of smoking cigarettes.

The Court finds that there is a triable issue of fact as to exposure:

Bell correctly notes the rule that the plaintiff in an asbestos case bears the burden of proving exposure to the defendant's asbestos-containing product. (See, e.g., *McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103.) However, on a motion for summary judgment/adjudication, the initial burden is on Bell as moving party to demonstrate that Plaintiffs cannot establish an element of their case. (See *McGonnell v. Kaiser Gypsum Co.*, supra, 98 Cal. App. 4th at pp. 1102-1103.)

Bell first contends that Plaintiffs only have speculative evidence that Decedent worked with asbestos-containing products supplied by Bell. This contention lacks merit, as Decedent's deposition testimony is sufficient to establish that Decedent worked with asbestos-containing products sold by Bell's predecessor, Desert Service Corp. ("Desert"). Specifically, Decedent testified in his deposition that while he was operating Residential Air, they had two main suppliers for asbestos cement pipe: Heating and Cooling Supply ("H&C") and Desert (see Decl. of Plaintiffs' Counsel Tenny Mirzayan, Exh. A [Excerpts from Decedent's deposition], 100:4-15, 112:3-6); that they also used asbestos tape, which he obtained from H&C and Desert (see Def.'s Exh. 11 [Excerpts from Decedent's deposition], 600:18-603:9); that they used Duro Dyne flex connectors with canvas asbestos (see Decl. of Plaintiffs' Counsel Tenny Mirzayan, Exh. A [Excerpts from Decedent's deposition], 132:1-14, 720:14-16); that they used Reliable Steel as a source of materials, but much less frequently than H&C and Desert (id. at 595:20-24); that he knew that the Duro Dyne flex connectors contained asbestos because it said so on the "spec" sheet (id. at 720:21-25), and because they ordered the ones with asbestos (id. at 1665:4-25); that he saw and used the flex connectors during the entire time he operated Residential Air, and that they would cut the flex connectors to use them (id. at 724:3-15).

Although Decedent later expressed doubts as to obtaining "transite" pipe from Desert, he consistently testified that he obtained and used asbestos tape and asbestos-containing Duro Dyne flex connectors from Desert and H&C while at Residential Air. This testimony, along with the testimony of Plaintiffs' expert industrial hygienist Philip John Templin

based on Decedent's deposition testimony indicating that, in Templin's opinion, Decedent was exposed to asbestos from using such products (see Mirzayan Decl., Exh. F [Excerpts from Templin's deposition], 141:10-17, 142:5-143:23), is sufficient to create a triable issue of fact as to whether Decedent had substantial exposure to asbestos-containing products attributable to Bell.

Bell contends that even assuming arguendo that Decedent worked with asbestos-containing products sold by Bell's, Plaintiffs' factually-devoid discovery responses indicate that they do not have evidence regarding the frequency, duration, or proximity of each exposure, which Bell contends is required under *Whitmore v. Ingersoll-Rand Co*. However, Bell overstates the evidence necessary to establish exposure under *Whitmore*:

" 'A threshold issue in asbestos litigation is exposure to the defendant's product. ... If there has been no exposure, there is no causation.' [Citation.] Plaintiffs bear the burden of 'demonstrating that exposure to [Bechtel's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [Whitmire's] risk of developing cancer.' [Citation.] 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [Whitmire].' [Citation.] Therefore, '[plaintiffs] cannot prevail against [Bechtel] without evidence that [Whitmire] was exposed to asbestos-containing materials manufactured or furnished by [Bechtel] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' [Citations.] 'While there are many possible causes of any injury, " '[a] possible cause only becomes "probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.' " [Citation.]' [Citation.]
(*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal. App. 4th 1078, 1084.)

Whitmore, at most, requires evidence regarding the frequency, regularity, and proximity of exposure. As indicated above, Decedent testified that he used the asbestos-containing Duro Dyne flex connectors throughout his operation of Residential Air, and that he would cut the flex connectors to fit. Nor does *Rutherford v. Owens-Illinois, Inc*., also cited by Bell in support of this argument, appear to require more. (See *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal. 4th 953, 975.)

Moreover, Bell is not entitled to rely on Plaintiffs Gertrude Denyer's, Edward Denyer's, and Elisabeth's Denyer's factually devoid discovery responses on the issue of exposure and causation to shift the burden, because there is no evidence that they were percipient witnesses to Decedent's work during the relevant period and – even assuming arguendo that their discovery responses are factually deficient – they would not in the usual course of events have personal knowledge of such facts. In short, Plaintiffs' discovery responses do not establish that Plaintiffs cannot establish the necessary facts regarding Decedent's exposure based on Decedent's own testimony and expert testimony. (See, e.g., *Bockrath v.* Aldrich Chemical Co. (1999) 21 Cal. 4th 71, 84.)

Bell argues that the witnesses and documents identified by Plaintiffs in their discovery responses do not support their claims. For example, Bell relies on hearsay deposition testimony given by such witnesses in other actions (see, e.g., Material Facts Nos. 38, 39, 40), and there is no showing of those witnesses unavailability to testify in this action or a shared interest which would support a finding that such deposition testimony is admissible. (See, e.g., *Gatton v. A.P.* Green Services, Inc. (1998) 64 Cal. App. 4th 688, 692-693.) Moreover, the discovery responses relied on by Bell are not factually deficient on their face, and contain objections which render their significance unclear.

Finally, Bell cites to the declaration of certified industrial hygienist Kathy Jones for the propositions that (i) Decedent was not substantially exposed to respirable asbestos from any product supplied by Bell (see Moving Separate Statement, Material Fact No. 57); (ii) Decedent's total exposure to asbestos would not have resulted in any meaningful release of airborne levels of friable asbestos (id. at Material Fact No. 58); and (iii) there is no evidence that Decedent was substantially exposed to asbestos from any product supplied by Bell (id. at Material Fact No. 59). However, Ms. Jones' conclusions in ¶22 of her declaration are based on an overly-restrictive interpretation of Decedent's testimony regarding exposure as being speculative and not establishing exposure (see Jones Decl., ¶¶17-21), and her conclusion, not supported by Decedent's deposition testimony, that: "There is no evidence that Decedent worked with any asbestos-containing product supplied by Bell, Reliable Steel, or Desert Service during the time he worked at Residential Air Conditioning....." (Id. at ¶22.). Moreover, other than the argument that Decedent's deposition testimony regarding exposure is speculative, Jones also fails to provide any a basis for her conclusion that Decedent's work would not have resulted in his exposure to meaningful levels of friable asbestos from any product supplied by Bell. (See, e.g., *Casey v.*

Perini Corp. (2012) 206 Cal. App. 4th 1222, 1233.) Jones;' reliance on an over-restrictive view of Decedent's deposition testimony and lack of a reasoned explanation for her conclusions undermines her conclusions regarding exposure. Moreover, even if Jones' statements were sufficient to satisfy Bell's initial burden as moving party (and they are not), the deposition testimony of Decedent and Templin would be sufficient to create a triable issue of fact as to Decedent's exposure to a product attributable to Bell. Based on the above, there is a triable issue of fact on the issue of exposure.

The Court finds that there is a triable issue of fact as to medical causation:

Bell contends that there is no triable issue of fact as to whether Decedent's lung cancer was caused by exposure to asbestos in Bell's products based on (i) Ms. Jones' declaration statements indicating that Decedent was not substantially exposed to asbestos from any Bell product; and (ii) the declaration of Bell's medical expert Dr. Gail Stockman's expert opinion that Decedent's lung cancer was caused by his cigarette smoking, with no contribution from exposure to asbestos. (See Stockman Decl., ¶28.)

Ms. Jones' statements in (i) above are insufficient to support Bell's contention that Decedent was not substantially exposed to asbestos from Bell's products for the reasons stated above. Dr. Stockman's opinion in (ii) above is sufficient to shift the burden on medical causation to Plaintiffs. However, Plaintiffs satisfy their shifted burden by submitting the declaration of their own expert, Dr. Robert Fallat, who opines, inter alia, that: "Every exposure to asbestos must be considered a substantial factor in causing lung cancer." (See Fallat Decl., ¶6.) In their Reply Papers, Bell argues that the Court should not consider Dr. Fallat's opinion because it is contrary to the medical causation standard established by the California Supreme Court in *Rutherford v. Owens-Illinois*. However, Dr. Fallat's opinion – if accepted as true – establishes that Decedent's exposure to Bell's products – as established through the deposition testimony of Decedent and Plaintiffs' expert Templin – was a substantial factor in his disease.

On a motion for summary judgment/adjudication, a trial court may not weigh the testimony of the parties' experts (see, e.g., *Andrews v. Foster Wheeler LLC* (2006) 138 Cal. App. 4th 96, 113), and determining the credibility of experts is a question for jury. (See *Chavez v. Glock, Inc.* (2012) 207 Cal. App. 4th 1283, 1309.) Given the conclusion above that there is a triable issue of fact as to whether Decedent was substantially exposed to asbestos from Familian's products, and Fallat's opinion (which he contends is the consensus opinion) that every exposure to asbestos is a substantial factor in causing cancer), there is a triable issue of fact as to whether Decedent's exposure to asbestos was a substantial factor in causing his lung cancer.

Moreover, the foreign authorities relied on by Bell for the proposition that expert testimony such as Dr. Fallat's is not admissible are distinguishable; even the few cases applying California substantive law are also applying federal rules and case law in determining the standards of admissibility. (See, e.g., *Sclafani v. Air & Liquid Systems Corp.* (C.D. Cal. 2014) 14 F.Supp.3d 1351, 1356-1357 [concluding that the expert's opinion was admissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals* (1993) 509 U.S. 579, and did not address the question of whether the exposure was a "substantial factor" in the plaintiff's disease].) Simply stated, although Bell's argument has some support, under California's rules for motions for summary judgment/adjudication the Court is required to view the Plaintiffs' evidence liberally. (See *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.) Under this liberal standard, the Court will consider Dr. Fallat's conclusions here. Based on the above, there are triable issues of fact on the issues of exposure and medical causation, and Bell's request for summary judgment based on these issues must be denied.

Defendant Bell's Request for Summary Adjudication

In the alternative to summary judgment, Bell requests summary adjudication of three specified Issues: (i) Plaintiffs' third cause of action for false representation; (ii) Plaintiffs' fourth cause of action for intentional tort; and (iii) Plaintiffs' request for punitive damages.

False Representation Claim:

As to the claim for false representation, Bell contends that Plaintiffs have no evidence indicating that (i) Bell made any misrepresentations to Decedent; or (ii) Decedent justifiably relied on any such misrepresentations. However, neither of these contentions, even if true, are sufficient to entitle Bell to summary adjudication of Plaintiff's false representation claim. First, as to contention (i) above, a misrepresentation directly to Decedent is not an essential element of a claim

for false representation. The Restatement Second of Torts, §402B, provides that:

"One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though
(a) it is not made fraudulently or negligently, and
(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller."

Accordingly, the fact that Bell never made a misrepresentation to Decedent is not a complete defense to a false representation claim. Second, as to contention (ii), this contention is based on Material Facts Nos. 68 through 83 which, collectively, are intended to demonstrate that Plaintiffs have no evidence regarding reliance. However, Material Facts Nos. 78 through 83 are the same as Material Facts Nos. 36 through 41, all of which are disputed and not established. Accordingly, Bell fails to demonstrate that Plaintiffs will not be able to submit any evidence showing reliance at trial, and therefore fails to satisfy its initial burden as to this claim. Based on the above, Bell's request for summary adjudication of the false representation claim must be denied.

Intentional Tort Claim:

Bell contends that it is entitled to summary adjudication of the intentional tort claim on the grounds that (i) Plaintiffs have no evidence that Bell knew that asbestos was hazardous during the relevant time period; and (ii) Bell had no duty to investigate the hazards of asbestos.

As to ground (i), Bell cites to Material Facts Nos. 85 through 100, which, collectively, are intended to show that Plaintiffs have no evidence that Bell knew about the hazards of asbestos during the relevant time period. However, Bell's Material Fact No. 92 is disputed and not established, and Bells Material Facts Nos. 97-100 are the same as Material Facts Nos. 36 through 39, all of which are disputed and not established. Accordingly, Bell fails to demonstrate that Plaintiffs will not be able to submit any evidence showing Bell's knowledge of this hazard at trial, and therefore fails to satisfy its initial burden as to such knowledge.

As to ground (ii), assuming that Bell is correct that it had no duty to investigate the hazards posed by asbestos, this point is not dispositive due to Bell's failure to establish that Plaintiffs will not be able to show that Bell had actual knowledge of those hazards at the relevant time. Finally, Bell makes an argument that Plaintiffs have no evidence that Familian intended to harm Decedent. However, Bell cites no authority for the proposition that an "intent to harm" is an element of claim for intentional tort. Instead, Bell cites to authority that one element of a fraud claim is an intent to deceive. As a result, even if Bell were correct that Plaintiffs have no evidence that Bell intended to harm Decedent, Bell fails to show that such intent is an essential element of Plaintiffs' claim. Based on the above, Bell's request for summary adjudication of the intentional tort claim must be denied.

Punitive Damages:

Bell contends that it is entitled to summary adjudication of Plaintiffs' claim for punitive damages on the ground that Plaintiffs do not have any "clear and convincing evidence" that Bell acted with "malice, oppression, or fraud." Bell cites to Material Facts Nos. 103 through 117 which, collectively, are intended to show that Plaintiffs have no evidence that Bell acted with "malice, oppression, or fraud." However, Material Fact No. 110 is the same as Material Fact No. 92, which is disputed and not established; and Material Facts Nos. 113 through 117 are the same as Material Facts Nos. 37 through 41, which are disputed and not established. Accordingly, Bell fails to demonstrate that Plaintiffs will not be able to submit "clear and convincing" evidence showing that Bell acted with "malice, oppression, or fraud" toward Decedent, and therefore fails to satisfy its initial burden on this issue. Based on the above, Bell's request for summary adjudication of Plaintiffs' request for punitive damages must be denied.